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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 518

EDWARD G. DOUGHERTY, *Petitioner*

vs.

GENERAL MOTORS CORP.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

NEWMAN & BERK,
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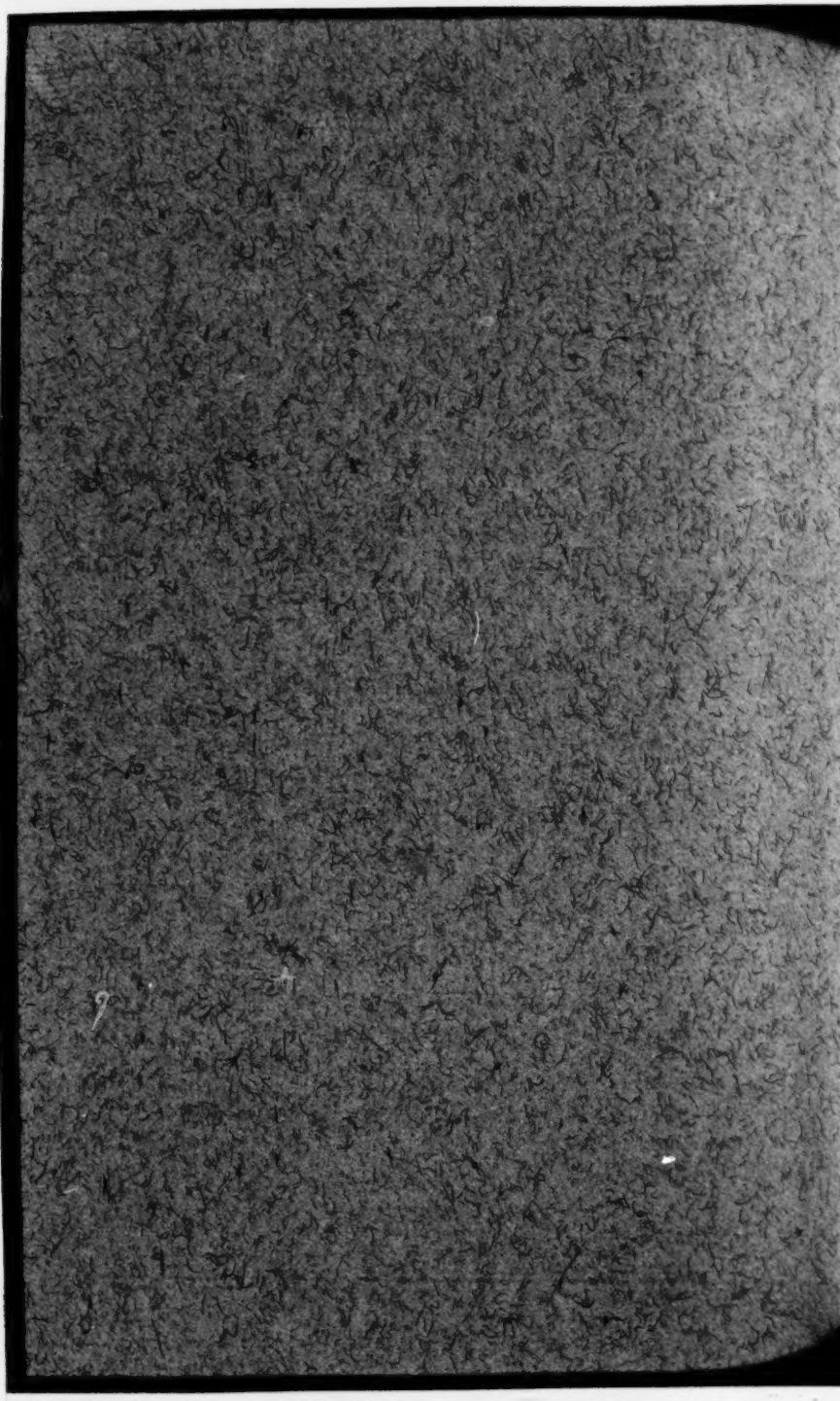

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Edward G. Dougherty, by his attorneys, and on behalf of himself and all fellow employees similarly situated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 8, 1949.

Opinions Below

The opinion of the district court (R. 26) is not officially reported. The opinion of the Court of Appeals for the Third Circuit (R. 41) is reported at 176 F. 2d 561.

Jurisdiction

The judgment of the Court of Appeals was entered on August 8, 1949. Because of substitution of counsel, this

Court, by an order dated November 5, 1949, extended to and including January 5, 1950, the time for filing a petition for certiorari. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Questions Presented

1. Whether denying a veteran vacation rights which other employees who remained at their employment received, and which the veteran would have received but for his absence in military service, violates Section 8 of the Selective Training and Service Act of 1940.[1]

2. Whether accrual of vacation rights to a veteran during his military service is limited to the accrual to employees on other types of furlough or leave of absence.

Statute Involved

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885) as amended (50 U. S. C. Appendix 308) provide as follows:

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3(b) shall be entitled to a certificate to that effect upon the the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.

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(b) In the case of any such person who, in order to perform such training and service, has left or leaves a posi-

[1] Petitioner considers that the court below erred in interpreting the collective bargaining agreement so as to deny him vacation rights, and will so argue if the writ is granted. However, he does not urge this as a reason for granting the writ.

tion, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

• • • • • • •

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

• • • • • • •

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

• • • • • • •

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specif-

ically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, reasonably satisfied that the person so applying is entitled to such benefits shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * * *

Statement

On March 20, 1947, Edward G. Dougherty, petitioner, instituted this action against his employer, General Motors, respondent, under Section 8 of the Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 58 Stat. 798, 50 U. S. C. App. 308 (hereafter called "the Act") in the District Court of the United States for New Jersey. (R. 2). He claimed pay in lieu of vacation for 1946, the year he was released from naval service and reinstated in his former position pursuant to the Act. (R. 3). The facts were stipulated, except for a brief explanation of Dougherty's 1942 vacation pay at the trial. (R. 10).

He worked steadily for General Motors from the time he was first hired on October 21, 1938, until his induction into the Navy on January 30, 1943. There was a brief interrup-

tion when General Motors converted to war work, which did not affect petitioner's seniority. He was honorably discharged from the Navy April 2, 1946, and applied for reemployment about May 1, 1946. A strike was then in progress, and he was reinstated on June 3, 1946. (R. 27). He has worked steadily for General Motors since then. General Motors refused to give him any vacation pay for 1946, contending that it was not obliged to do so by the Act or the collective bargaining agreement in effect then. (R. 8, 10).

Vacation pay agreements were negotiated annually between the employer and the union to which Dougherty belonged, UAW-CIO. (R. 28, 30, 31, 32, 34). Each agreement from 1942 through 1946 provided that vacation pay for that calendar year should be given to employees working on July 1 of the year, or (beginning in 1944) to employees working during the last pay period in June of the year, provided always they had the requisite seniority. (R. 28, 30, 32, 33, 34). Employees entering military service after these annual dates were granted vacations under the 1942-1945 contracts. (R. 28, 30, 32, 33). Special provisions protected those laid off on these annual dates because of conversion to war production in 1942 or cut-backs in war work in 1945. (R. 28, 33). Employees not actually working on these dates were granted vacation pay if they had worked 75% (reduced to 50% in 1946) of the pay periods during the preceding twelve months. (R. 28, 30-31, 32, 33, 35). Employees with one year's seniority on July 1 of each year were given 40 (48 in 1943-1945) hours average straight time pay in lieu of vacation. (R. 28, 30-31, 32, 33). Those with five years' seniority on July 1 were given 80 (96 in 1943-1945) hours pay. (R. 29, 31, 32, 33, 44a-45a).

In 1946 the amount of vacation pay was changed from the 48 or 96 hours pay to a percentage of 1945 gross earnings. Employees with one year's seniority were given 2%

of their 1945 earnings; those with three years' seniority, 3%; and those with five years' seniority, 4½%. (R. 34-35). In the same agreement the provision granting vacation pay to those subsequently entering military service was deleted. (R. 34). Dougherty was in the navy throughout 1945 and had no earnings in that year. He was discharged from the Navy in April, 1946, too late to work 26 pay periods between July 2, 1945 and June 30, 1946. (R. 27). He received no vacation pay for the month he worked in 1943 (R. 22-23), and none for the seven months he worked in 1946. (R. 35).[2] In his complaint he demanded two weeks' vacation pay at his current hourly rate for 1946. (R. 3). He did not receive, nor does he claim, vacation pay for the period of his naval service. (R. 3, 36, 48a).

The District Court denied his claim entirely, on the grounds (a) to allow his claim would "be a discrimination against non-veteran employees on furlough or leave of absence" who also could not qualify under the 1946 agreement (R. 36); and (b) because Dougherty had no 1945 earnings, "it would be impossible to compute the amount to which he would be entitled" (R. 36); (c) the employer had no rule or practice concerning granting of vacation pay at the time Dougherty entered the armed forces. (R. 36). The Court of Appeals for the Third Circuit affirmed the judgment on appeal on the first two grounds above, saying (a) the 1946 vacation clause did not conflict with the statute

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[2] Perhaps the vacation pay for each year may be attributed to the year July-June rather than the calendar year, because (1) the employee's eligibility was not determined until the end of June; (2) work during the entire period July-June might in some cases determine eligibility, and (3) the payment was not actually made until the last half of the calendar year. If so, Dougherty has still worked eight months without a vacation, or part of one, or pay in lieu thereof: January, 1943 and June-December, 1946, with the difference that his claim for July-December, 1946 would be affected by the 1947 annual agreement. Dougherty does not argue for this interpretation, the employer has not done so, and it may therefore be disregarded.

"as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence" (R. 45); and (b) "the 1946 vacation pay provisions cannot be declared illegal as to Dougherty simply because their effect is to deny him—and any other General Motors employee, veteran or non-veteran, who had no 1945 gross earnings—1946 vacation pay." (R. 45). As a third reason for denying Dougherty any vacation pay, the Court held that he was not discriminated against, saying "we have no reason to believe that the bargaining agents of either the union or General Motors sought or contemplated additional restriction of the veterans' vacation benefits" and "Dougherty cannot gain legal relief from a provision which was intended to apply to veterans and non-veterans alike and which was not 'a skillful device of hostility to veterans.'" (R. 44) [3]

Specification of Errors to Be Urged

The United States Court of Appeals for the Third Circuit erred:

1. In holding that a veteran may, because of his absence in military service, be denied vacation rights which other employees who remained at their employment received, and which the veteran would have received but for his absence in military service.

2. In holding that the vacation rights guaranteed a veteran by the Act accrue to him during his military service

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[3] At the same time, the Court of Appeals recognized that the effect of the 1946 provision was singularly harsh toward veterans. On this point it observed, "We are not unaware that, since few veterans were restored to their positions with General Motors until the closing months of 1945 at the earliest, (our) interpretation—means that veterans restored to duty with that company receive little, if any, vacation pay for the year 1946." 176 F. 2d 561, 562.

only to the extent they accrue to employees on other types of leave or furlough.

3. In holding that a collective bargaining agreement fixing the amount of 1946 vacation pay as a percentage of the employee's 1945 earnings denied any vacation pay to a veteran absent in military service in 1945.

4. In misapplying the principle of *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (as reaffirmed in *Oakley* v. *L. & N. R. R.*, 70 S. Ct. 119) by holding that the decision of this Court in *Aeronautical Lodge* v. *Campbell*, 69 S. Ct. 1287, compelled dismissal of Dougherty's action.

5. In affirming the judgment of the district court dismissing the complaint.

Reasons for Granting the Writ

This Court has not heretofore determined the extent to which a veteran continues, under the Act, to accumulate vacation pay or vacation rights during his military service. A large part of the workers throughout the country have such rights. Disagreement and litigation over this issue has been widespread, and the decisions of the lower courts are not in harmony.

Nearly every veteran in General Motors' employ will be affected by the outcome of this suit. Vacation pay for 1946 at General Motors was changed from "two weeks' pay" to "4½% of 1945 earnings." Very few veterans were released from the armed forces until several weeks after V-J day, August 14, 1945. The mass demobilization was not completed until well into 1946. It was therefore almost impossible for a General Motors' employee in the armed forces to have any earnings in 1945 comparable to earnings of employees who remained behind, upon which to compute 1946 vacation pay. General Motors itself, in an effort to

have this suit dismissed before trial as involving issues identical with those in a suit then pending against it in Michigan, has estimated that 50,000 of its employees are interested in this case.[4]

I

The judgment of the court below stands for the proposition that the Act does not require the veteran to be placed in the same status, or at the same level of benefits, in his employment as he would have reached had he remained steadily on the job instead of being absent in military service. To sustain this conclusion, the court relied almost exclusively on *Aeronautical Lodge* v. *Campbell*, 69 S. Ct. 1287. In so doing, it misapplied that decision and ignored the "escalator" principle announced by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 and reaffirmed in *Oakley* v. *L. & N. R. R.*, 70 S. Ct. 119.

The *Fishgold* and *Oakley* cases establish that the purpose of the Act is to protect the veteran against any loss of ground in his employment as a result of his absence in military service; he gains no advantage over other employees beyond what he would have enjoyed had he remained steadily on the job, but he remains on the escalator with them and must not be penalized on his return because of his absence in military service.[5]

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[4] A similar suit, *Cushnier* v. *Ford Motor Co.*, estimated to involve 20,000 employees, has been argued and awaits decision of Judge Picard in Michigan.

[5] *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284-285).

"As we have said, these provisions guarantee the veteran against loss of position or loss or seniority by reason of his absence. He acquires not

Dougherty asked for such treatment, and for no more. He desires only the status as to vacation pay which he would have achieved had he remained on his job. He does not ask for greater vacation rights than are now enjoyed by non-veterans who remained behind and are his equals in length of service with General Motors, counting Dougherty's military service as part of his employment period. He seeks no form of preference or superseniority over such fellow-employees, but asks for equality with them in respect to vacation pay. He worked approximately eight months (January 1943 and June-December 1946) for General Motors without receiving any vacation pay. He asks only that his absence in the armed forces in 1945 be not held against him so as to deny him any vacation pay for 1946 because he had no earnings in 1945 on which 1946 vacation pay could be computed under the collective bargaining agreement then in effect. Had he not been in military service in 1945, he would have had earnings in that year equal to those of the average employee at his rate of pay. He simply wishes to count his military service as time on the job for the purpose of reaching a status, a level of pay or benefits, which he would have reached but for his military service, as the *Fishgold* and *Oakley* cases entitle

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only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

Oakley v. *L. & N. R. R.*, 70 S. Ct. 119:

"We stated, in effect, that an honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment" (p. 122).

him to do.[6] To grant his request will not cause any employee, veteran or non-veteran, to suffer any loss of ground whatever.

There is no question here of exempting veterans generally from changes in collective bargaining agreements which alter the framework of job benefits, seniority, or incidents of employment. Likewise, there is no proposal here to restrict the freedom of an employer or a union to bargain collectively concerning this framework; nor is there any contention that a veteran has a right to vacation pay in the absence of an agreement or custom conferring it. Once the framework is established, however, the Act requires that a veteran's time in military service be treated as time on the job so as to enable him to reach that status, that level of privilege or benefit, that rate of compensation, that degree of advancement, in short that "position" in the framework which he would have reached had not military service blocked his progress.[7] The structure of employment incidents and job features cannot be gerrymandered to deny this credit and to keep veterans from riding the escalator

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[6] The escalator principle of these cases is in accord with Congress' own view of the Act, and has been approved by enactment of Section 9(c)(2) of the Selective Service Act of 1948 (Public Law 759, 80th Cong.), as follows:

"It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Congress regarded this as merely declaratory of the meaning of the 1940 Act. Sen. Rept. 1268, 80th Cong., 2d Sess. (1948) 16.

[7] It should be noted that neither petitioner's claim nor the ground on which he rests it involves payment of vacation pay, or of any other form of compensation, for years in which he was absent from the job. The issue is the proper *level* or *rate* of his job benefits on and after his reinstatement, rather than pay for time not worked. Military service does not excuse the veteran from earning his hire.

operating within this structure. The decision below would permit the veterans to be kept off the escalator in future years by appropriate choice of base year earnings on which to figure vacation pay each year. It would allow hard facts and statutory goals in all areas of veterans' reemployment to be obscured and defeated by fortunate or artful choice of ingenuous words.

The *Campbell* case stands for no such proposition. It decided that the Act did not insulate veterans from the effects of a collective bargaining agreement, adopted during their absence, placing union officials at the top of a seniority list so as to be reached last in a lay-off. Those veterans were not penalized because of their absence in military service; had they remained on the job, they would have been in precisely the same position on the seniority roster. Unlikely Dougherty, their absence cost them no loss of ground. The *Campbell* case merely applied the *Fishgold* principle to a particular situation. In Dougherty's situation, that principle is clearly at odds with the judgment of the court below, and requires its reversal.

II

The court below held that to deny Dougherty any vacation pay for 1946 did not conflict with the statute because he was not thereby placed "in a position inferior to that of non-veterans on leave of absence" (176 F. (2d) at 564). The necessary result of this decision is that the Act protects veterans against loss of ground as to vacation rights only to the extent employees on other types of leave or furlough are granted vacation rights. Thereby, the court not only disregarded the escalator principle, but also deprived Section 8(b) of the Act of any substantive meaning. 8(b) requires that the veteran be restored to "such (former) position or a position of like seniority, status and pay."

This general and basic guaranty is itself sufficient to insure the veteran his place on the escalator and to protect him against penalty on account of his military service.[8] Plainly, vacation rights are as much part of the "status," the "seniority" or the "pay" of the employee protected by 8(b) as they are part of the unspecified job elements as to which the veteran is "considered as having been on furlough" under 8(c).

Following this general guaranty, section 8(c) lists certain specific details, minimum features of job protection, below which the veteran's status cannot be reduced. It is this section which contains the requirements that the veteran must be "considered as having been on furlough or leave of absence" during his military service and must participate in "other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces." These provisions were added in an effort to make the Act a clearer and more effective means of protecting veterans. Both the author of the provisions and the Senate Military Affairs Committee Chairman considered the addition of these clauses to *increase* the protection previously afforded. 86 Cong. Rec. 10,914.

To regard these clauses as a limitation upon, a ceiling over, the general guaranty of the statute contained in 8(b), as did the court below, sacrifices the clear purpose and total structure of the Act to one small clause in it. A collec-

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[8] "the veteran is entitled to be restored to his old *position* • • • if • • • he is demoted, his *status*, which the Act is designed to protect, has been affected • • • he would then lose his *old position*." (Emphasis supplied.) *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 286.

tive bargaining agreement that leave time generally shall not count toward seniority cannot exclude time in military service from seniority under the *Fishgold* rule; no more can an agreement that vacation rights shall not increase or accrue during leave of absence prevent them from increasing and accruing during an employee's military service. The upshot of the decision below is that the veteran's statutory right to retain his place on the escalator can be defeated by an agreement or practice which keeps other employees on leave off the escalator. Under this decision, if the veterans are protected without the statute, the statute also protects them; and if they are not protected without it, the statute does not aid them. This Court has said repeatedly that no such result is intended or reached by this Act.

Moreover, the decision below distorts the plain language of the statute. It denies the veteran the right to vacation pay in accordance with "established rules or practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted," as provided in 8(c). Under those rules, Dougherty obviously was entitled to two weeks' vacation pay. At the same time, it applies against him another clause in that section, "considered as having been on furlough or leave of absence," so as to exclude the veteran from any vacation pay. Consequently, the escalator on which the General Motors veterans stand can move only downward.

In fact, the difficulties and inconsistencies of the Court of Appeals here are only symptomatic of the confusion prevailing among all the courts during the last three years because of the "leave of absence" approach to vacation pay questions. The reasoning and principles in these cases cannot be reconciled, and are frequently in conflict with

the *Fishgold* rule.[9] It is important that this Court end the confusion by reviewing and correcting the judgment below.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

NEWMYER & BRESS,
SHELDEN E. BERNSTEIN,
Attorneys for Petitioner.

Washington, D. C., January, 1950.

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[9] Contrast *Mentzel* v. *Diamond*, 167 F. 2d 299 (C.A. 3, 1948) and *MacLaughlin* v. *Union Switch and Signal Co.*, 166 F. 2d 46 (C.A. 3, 1948) with *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C.A. 2, 1948), *Siaskewicz* v. *General Electric Co.*, 166 F. 2d 463 (C.A. 2, 1948) and *Randolph* v. *Seattle Star, Inc.*, 168 F. 2d 274 (C.A. 9, 1948). The *MacLaughlin* case was decided in the veteran's favor on the ground he had worked a year for which he received no vacation pay and the statute excused him from the requirement that he be on the job on December 31 in order to receive it. It is somewhat surprising that the same court should decide the present case against the veteran because employees on non-military furlough at the time he was absent were also denied vacation pay.

District Courts have manifested a similar and equally widespread misunderstanding in their treatment of vacation pay questions. See *Brown* v. *Watt Car & Wheel Co.*, 17 Labor Cases 65,293 (S.D. Ohio, 6/6/49, on appeal to C.A. 6); *Horan* v. *Todd Shipyards Corp.*, 13 Labor Cases 63,942 (S.D. N.Y. 7/22/47); *Flynn* v. *Ward Leonard Electric Co.*, 84 F. Supp. 399 (S.D. N.Y. 1949); *Woods* v. *Glen Alden Coal Co.*, 73 F. Supp. 871 (M.D. Pa. 1947).